Nos. 16-74, 16-86, 16-258

FILED
FEB 23 2017
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
Petitioners,
v.
MARIA STAPLETON, ET AL.,
Respondents.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,
Petitioners,
v.
LAURENCE KAPLAN,
Respondent.

DIGNITY HEALTH, ET AL.,
Petitioners,
v.
STARLA ROLLINS,
Respondent.

On Writs of Certiorari to the Third, Seventh, and Ninth Circuits

BRIEF OF *AMICUS CURIAE* PENSION RIGHTS CENTER IN SUPPORT OF RESPONDENTS

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February 23, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. IRS "Church Plan" Rulings Harm Pension Plan Participants	3
A. Introduction	3
B. The Funded Status of Plans with IRS Rulings	3
C. How IRS Church Plan Rulings Affect Individuals	5
II. The History of the Church Plan Exemption	14
III. Statutory language and legislative history show that Congress intended that (C)(i) only exempt church-established plans that are maintained by church pension boards	24
IV. ERISA Does Not Permit Voluntary, Revocable ERISA Plans	27
V. Petitioners Exaggerate the Consequences to Plan Sponsors of Affirmance of the Decisions Below and Ignore the Threat to Retirement Security that these "Church Plans" Pose to Agency Employees and Their Families	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page(s)
Butler v. Holy Cross Hospital, No. 1:16 cv-05907 (N.D. Ill 2016)	8
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Owens v. St. Anthony Medical Center, Inc., No. 1:14-cv-04068 (N.D. Ill 2017)	8
CONSTITUTION	
U.S. Const. amend. I	19
STATUTES AND REGULATIONS	
I.R.C. § 403(b)	29
I.R.C. § 410(d)(2)	28
I.R.C. § 411(d)(6)	29
I.R.C. § 412(c)(1)	28
26 I.R.C. § 414(e)(3)	16
26 I.R.C. § 414(e)(3)(A)	24
26 I.R.C. § 501(c)(3)	27
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et. seq.*	*passim*
29 U.S.C. § 1002(32)	15
29 U.S.C. § 1002(33)	15
29 U.S.C. § 1002(33)(C)(i)	23
29 USC § 1032(c)(1)	29

TABLE OF AUTHORITIES—Continued

Page(s)

29 USC § 1032(c)(3) 29

29 U.S.C. 1081(i) 4

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INTEREST OF *AMICUS CURIAE*

The Pension Rights Center is a national nonprofit consumer organization that has been working for more than four decades to protect and promote the retirement security of American workers, retirees, and their families.[1] The Center advocates for laws and regulations that expand retirement programs, and make them fairer, more adequate and secure; helps individuals obtain retirement benefits they have been improperly denied; and works to preserve pension protections conferred by Congress in the landmark private pension law, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et. seq.*

The issue presented by this case, whether a pension plan established by a religiously-affiliated hospital, school, or social services organization is a "church plan" exempt from federal law, affects millions of pension plan participants around the country. Many of these individuals have contacted the Pension Rights Center because they have lost, or fear they will lose, all or part of the pensions they had earned over a lifetime of work. These include current and former employees of Catholic hospitals, Jewish social services agencies, and Protestant schools. The Center is filing this brief to provide the Court with an understanding of how the issues presented by this case will affect the retirement security of these individuals, and the results of the legislative analysis and research we have undertaken on their behalf.

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[1] The parties have consented to the filing of all briefs of *amici curiae*. No counsel for a party authored this brief in whole or in part. No person other than the amicus and its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Pension Rights Center has been contacted by current and former employees of religiously-affiliated hospitals, schools, and social services agencies around the country who have asked for our help after learning that the Internal Revenue Service (IRS) had issued a private letter ruling stating that their pension plan is a "church plan" and that their promised benefits are no longer protected by ERISA – and are no longer guaranteed by the federal pension insurance program, the Pension Benefit Guaranty Corporation (PBGC). In each case, the participants were also told that the church affiliated with their employers disclaimed any responsibility for the plan.

Our analysis of the relevant sections of the law, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1303 (1980), and research into its legislative history demonstrate conclusively that Congress did not exempt plans established by religiously-affiliated hospitals, schools, and social services agencies from the protections of ERISA.

Petitioners' contentions that upholding the decisions below will cause "utter chaos," "crippling costs," and "will force many organizations to stop offering defined-benefit plans entirely" are unwarranted. These claims overlook the fact that Petitioners or their predecessors fully complied with ERISA for decades, as well as the fact that government agencies and the courts have ample discretion to mitigate any adverse impacts to the plan sponsors while ensuring that their loyal, long-serving employees will receive the pensions that they have earned and were assured they would receive.

ARGUMENT

I. IRS "Church Plan" Rulings Harm Pension Plan Participants

A. Introduction

Petitioners contend that the church plan exemption does not threaten the millions of individuals currently participating in stand-alone pension plans of religiously affiliated non-profit organizations. They claim that despite the exemption, the plans of Petitioners are responsibly funded and suggest that they pose no threat to the retirement benefits earned by their employees.

Even if it were true that Petitioners' plans do not pose a threat to retirement security—an assertion that is questionable—the church plan exemption has been claimed by other stand-alone agency plans that are severely underfunded and has been claimed by plans that have already failed to pay promised benefits to their employees. The church exemption is not limited to well-funded plans. In Section C below, we describe some of the situations where we have been contacted by participants, which include situations where people have lost or are about to lose their pensions.

B. The Funded Status of Plans with IRS Rulings

It is important to note that the suggestion that the plans maintained by petitioners are adequately funded is open to question. Petitioners assert that their plans "are all funded at a level above the IRS's 80% minimum for ERISA plans." Pet. Br. 10. But there is no ERISA 80% minimum standard—plans are required quickly to amortize funding gaps as they

emerge, although there are severe additional restrictions that apply when a plan falls below an 80% funding level. *See* 29 U.S.C. § 1081(i). Indeed, the American Academy of Actuaries has issued an issue brief in which it characterizes the 80% funding standard as a myth:

> An 80% funded ratio often has been cited in recent years as a basis for whether a pension plan is financially or "actuarially" sound. Left unchallenged, this misinformation can gain undue credibility with the observer, who may accept and in turn rely on it as fact, thereby establishing a mythic standard.[2]

Moreover, it is unclear by what measure the funding ratios for Petitioners' plans were determined. ERISA imposes rules requiring more conservative assumptions than are sometimes used by plans that are not subject to ERISA. Petitioners do not indicate whether the funding ratios they report are based on ERISA or more liberal assumptions. And even slight differences in assumptions can result in enormous differences in funding ratios. Nor do Petitioners note whether the funding ratios they report incorporate various actuarial smoothing techniques, which can also have a significant effect on the calculation of funding ratios.[3]

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[2] The American Academy of Actuaries, Issue Brief, *The 80% Funding Standard Myth* (July 2012), https://www.actuary.org/files/80_Percent_Funding_IB_071912.pdf.

[3] It is also worth noting that newspaper articles about two of the Petitioners that were published before the commencement of this litigation showed funding levels considerably lower than 80%. The Associated Press reported that the funding level for the Dignity Health retirement plan was 66 percent at the end of 2012. Adam Geller, *Law Shields Churches, Leaves Pensions*

C. How IRS Church Plan Rulings Affect Individuals

The Pension Rights Center has been contacted by current and former employees of religiously-affiliated hospitals, schools, and social services agencies around the country who have asked for our help after learning that the Internal Revenue Service had issued a private letter ruling stating that their pension plan is a "church plan" and that their promised benefits are no longer protected by ERISA – and are no longer guaranteed by the federal pension insurance program, the Pension Benefit Guaranty Corporation. In each case, the participants were also told that the church affiliated with their employers disclaimed all responsibility for the plan.

1. In one situation involving an inner city hospital in Orange, New Jersey, we were able to provide the participants with information and assistance that helped them obtain the withdrawal of the "church plan ruling" and the restoration of pension insurance for their pensions. In that case, the ruling was withdrawn only eight months before the pension plan would have run entirely out of money to pay pensions to the plan's nearly 800 participants.[4] In another situation,

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Unprotected, Associated Press (Oct. 5, 2013), http://bigstory.ap.org/article/law-shields-churches-leaves-pensions-unprotected. The *Wall Street Journal* stated that the funding level for Saint Peter's pension plan was 64 percent in 2010. *See* Ellen E. Schultz, *IRS Nears Action on Church Pensions*, Wall Street Journal (June 5, 2010), http://www.wsj.com/articles/SB10001424052748704080104575286960632243300.

[4] In that situation, the hospital sponsoring the pension plan had been a secular hospital for 100 years and had operated its plan in full compliance with ERISA starting on January 1, 1974. In 1998 it entered into a financial management agreement with a Catholic health services entity, and in 2002, applied for and

we worked with participants in a Rockville, Maryland Jewish community center who were able to persuade the center's board of directors to withdraw the private letter ruling request before the IRS acted.[5]

2. In other instances, the participants contacted us long after the church plan rulings had been issued and after the decision had been made to sell their employer, terminate their severely underfunded plans, and give them a small fraction of the benefits they had counted on receiving. St. Mary's Hospital in Passaic, New Jersey, a member of the Catholic Health Association, one of the *amici* in this case, sponsored a pension plan that became covered by ERISA in 1974, but then received an IRS church plan ruling and a refund of PBGC premiums in 2001. It stopped complying with ERISA's funding requirements. The participants only learned about the IRS church plan ruling 12 years later when the hospital was being sold to a non-religious corporation and were told that their severely underfunded plan would be able to pay them a lump sum equal to only 40 percent of their hard-earned benefits. The nurses and orderlies reported

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received a church plan ruling from the IRS (along with a refund of insurance premiums the plan had paid to the PBGC). Within a year of receiving the ruling, the hospital filed for bankruptcy. It was only at a meeting to discuss the shutting down of the hospital that the employees learned for the first time that their pensions were no longer protected by federal law. *See* Alicia H. Munnell, *A Deed Well Done: Pensions Protected*, MarketWatch: Encore, June 26, 2013). http://blogs.marketwatch.com/encore/2013/06/26/a-deed-well-done-pensions-protected/

[5] Both of these situations are discussed in an April 1, 2013 *New York Times* article by Mary Williams Walsh, *IRS Reversal on 'Church Plan' Rescues a Fund*, N.Y. Times, April 1, 2013 http://www.nytimes.com/2013/04/02/business/an-irs-reversal-rescues-a-pension-fund.html?_r=0

that they were shocked to learn that the religious order that sponsored the hospital had "no legal obligation to fund the plan." Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic May Lose Their Pensions in Sale*, New Jersey Record, April 26, 2013. http://www.northjersey.com/news/health-news/retirees-from-st-mary-s-hospital-in-passaic-may-lose-their-pensions-in-sale-1.624917. Adam Geller, *Workers Find Retirement Money Jeopardized by Loophole Treating Hospitals, Agencies as Churches*, Associated Press, October 5, 2013, http://www.foxnews.com/us/2013/10/05/workers-find-retirement-moneyjeopardized-by-loophole-treating -hospitals/.

3. Most recently, we were contacted by Yardley, Pennsylvania and Schenectady, New York retirees who were notified toward the end of last year that their former employers had received church plan rulings years ago and because of poor investment performance, their previously federally-guaranteed pension plans, now administered by insurance companies, will run out of money to pay their benefits. In the case of St. James Hospital retirees, the money will run out in five to seven months. For St. Clare's Hospital retirees, pension payments will end in seven to eleven years. *See* Karin Price Mueller, *Bamboozled: How Catholic Hospitals Get Away With Letting Pensions Go Broke*, New Jersey Star Ledger (Nov. 28, 2016), www.nj.com/business/index.ssf/2016/11/bamboozled_how _catholic_hospitals_get_away_with_le.html; Claire Hughes, *Employees of Former St. Clare's Hospital Face Pension Insolvency*, Albany Times Union, January 10, 2017, http://www.timesunion.com/local/article/Employees-of-former-St-Clare-s-Hospital-face-10848930.php.

4. Other cases where retirees have been told that they will lose their promised pensions as the result of

IRS church plan rulings are being litigated. Examples include, *Owens v. St. Anthony Medical Center, Inc.*, No. 1:14-cv-04068, 2015 U.S. Dist. LEXIS 79531 (N.D. Ill. June 18, 2015) (plan terminated; reductions of up to 40 percent when plan was terminated); *Butler v. Holy Cross Hos*pital, No. 1:16-cv-05907 (N.D. Ill. filed June 6, 2016) (plan transferred to entity with few assets before a merger, then terminated. Retirees received half of the benefits they had earned); *Martinez-Gonzalez v. Cath. Sch. of the Archdioceses of San Juan Pension Plan*, No. 16-2077, 2011 U.S. Dist. LEXIS 11903 (N.D. Ill. Jan. 27, 2017) (plan terminated; pensions eliminated for current and retired school teachers); *see* Danica Coto, *Puerto Rico Church Strips Teachers of Pension Amid Crisis*, Associated Press via Washington Post, April 12, 2016, https://www.washingtonpost.com/world/the_americas/puerto-rico-church-strips-teachers-of-pension-amid-crisis/2016/04/12/80041ce6-0063-11e6-8bb1-f124a43f84dc_story.html

We have also provided information to individuals who have not yet lost benefits, including retired Livingston, New Jersey social workers who were concerned about a request for a church plan ruling submitted by their former employer, a Jewish federation. *See* Nathan Gutman, *Loophole Puts Pension Plans at Risk*, Jewish Daily Forward, February 13, 2012. http://forward.com/news/51150/loophole-puts-pension-plans-at-risk/.

5. Among the individuals who have sought help from the Center are current and former employees of Saint Peter's University Hospital, now part of Saint Peter's Healthcare System, one of the Petitioners in this case.

They contacted us after reading a *Wall Street Journal* article reporting that the Saint Peter's

pension plan was only 64 percent funded and that the hospital had sought a ruling from the Internal Revenue Service that its plan was a "church plan" exempt from all ERISA protections.[6] The participants were all long-service employees who had been assured throughout their work lives that their pensions were protected by the federal private pension law.

Over the years, they had received summary plan booklets, benefit statements, funding reports, letters and memoranda, assuring them that their pension plan was protected by ERISA, and that their benefits were insured by the federal pension insurance program, the Pension Benefit Guaranty Corporation. Those who contacted us – including nurses and orderlies, a bookkeeper, a former hospital official who had served as the hospital's CEO, CFO, and COO for 24 years, and the retired cafeteria supervisor who is the named plaintiff in the Saint Peter's litigation – were terrified that they would not be able to pay their day-to-day expenses in retirement if the IRS were to rule that their plan was a church plan.[7]

Center staff worked closely with the Saint Peter's participants, who first tried to persuade the hospital to withdraw its church plan ruling request, and then urged the Internal Revenue Service to deny the request.[8] When these efforts were unsuccessful, we

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[6] *See* Schultz, *supra*, note 3.

[7] *See* Tom Haydon, *N.J. Workers at Religious Institutions Fear Change Threatens Pensions*, New Jersey Star Ledger, January 12, 2012, http://www.nj.com/news/index.ssf/2012/01/nj_workers_at_religious_instit.html

[8] Center staff provided fact sheets, prepared letters, memoranda, answered questions, and assisted employees with comments to the IRS. We also convened conference calls and advised

introduced them to the law firms that are now advocating on their behalf.

Saint Peter's University Hospital established a defined benefit pension plan for its employees in 1964. Like the predecessor plans of the other Petitioners in this case and all other single-employer agency plans, the plan was required to be in full compliance with ERISA as of its January 1, 1974 effective date. The plan continued to comply with the law's reporting, disclosure, participation, vesting, accrual, fiduciary, funding, and pension insurance requirements until 2006, when at the recommendation of a major consulting firm, Ernst & Young, it applied for a church plan private letter ruling.[9] It continued to pay PBGC premiums through 2010. Saint Peter's did not receive a church plan ruling until August 14, 2013, after it had

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on the participants' blog, "Save Your Saint Peter's Pension," www.spuhpension.com.

[9] Many of the nation's largest consulting firms urged their religiously-affiliated nonprofit clients to apply for church plan rulings. As the chief financial officer of a religiously-affiliated hospital explained to the *Wall Street Journal*, the hospital had accepted the advice of KPMG, a large consulting firm, to seek a church plan ruling "for the cost savings and flexibility in funding." *See* Schultz, *supra*, note 3. Similarly, the Associated Press reported on a PowerPoint presentation made to the Hospital Center at Orange that included the statement "Deloitte and Touche identified opportunity to designate plan as a 'church plan' Allows greater freedom in funding requirements." *See* Geller, *supra*, note 3. In another presentation, a lawyer for a pension board selling its services noted that "church plans sound too good to be true because of the potential cost savings and flexibility they offer," which he listed as exemption from funding, vesting, disclosure, reporting, and PBGC insurance coverage. *See* James T. Herod, *Church Plan Questions and Answers*, at Q-1, Q-2, available at http://www.chhsm.org/pdfs/Church-Plans-QAs.pdf (last visited Feb. 21, 2017).

filed a Motion to Dismiss in the district court. It now claims that it "voluntarily" complied with ERISA for 32 years, but its summary plan descriptions informed employees that the plan was an ERISA plan, not that the plan was voluntarily complying with ERISA standards. The plan paid premiums to the PBGC, which plans that are exempt from ERISA are not eligible to do.[10] The IRS letter ruling stated that it was based on the finding that the pension plan was administered by a retirement plan committee.

Saint Peter's is distinguishable from the other Petitioners in not yet having received a refund of premiums paid to the PBGC. According to PBGC documents obtained under the Freedom of Information Act, Dignity Health's predecessor, Catholic Health West, received $1.425 million in premium refunds in 1993, after having complied fully with ERISA for 19 years.[11] Advocate Health's predecessor, Lutheran General, received a premiums refund of $1.161 million in 1999 after complying with ERISA for

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[10] *See* Statement of John Matuska, CEO, CFO, and COO of Saint Peter's University Hospital and member of its Retirement Committee from 1977 to 2001. "From at least 1977 until 2006, the Plan was operated as an ERISA-covered plan. As an ERISA covered Plan, the Plan was fully funded in accordance with ERISA, met ERISA reporting requirements, and paid insurance premiums to the Pension Benefit Guaranty Corporation." (J.A. 538)

[11] *See* Items 162–168 on p. 2 of a listing of PBGC refunds between 1992 and 1998, available at http://www.pensionrights.org/sites/default/files/docs/church_plan_refunds_1992-1998_2013.pdf. In the request for the IRS ruling, counsel for Dignity claimed that the Catholic Healthcare West plan and its seven predecessor plans had been "mistakenly" operated as though they were not church plans, and had "mistakenly filed annual reports (Form 5500) and mistakenly paid PBGC premiums." J.A. 651.

25 years.[12] An estimated $50 million in PBGC premiums have been refunded to pension plans that received church plan rulings.[13]

Saint Peter's is also distinguishable from the Dignity and Advocate situations in that the participants were notified that their employer had applied for a church plan ruling. This was the result of a September 11, 2011, IRS Revenue Procedure requiring, for the first time, that plans seeking church plan

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[12] *See* Item 215 on p. 24 of a listing of PBGC refunds between 1991 and 2005, available at http://www.pensionrights.org/sites/default/files/docs/listing_of_pbgc_church_plan_refunds_1991_-_2005.pdf. In a February 18, 2015, response to our FOIA request, PBGC General Counsel Judith R. Starr denied our request for documents relating to refunds between 1983-1991, because "PBGC's search did not locate any responsive documents with information relating to church plans in that date range." This may explain why a premium refund to the Evangelical Hospital Association Employees Pension Plan based on its March 7, 1991 IRS church plan ruling does not appear in the documents. Petitioners claim that Advocate operated as a church plan since 1980 (Pet. Br. 11), but cites no documentation. It is highly likely that this plan operated as an ERISA plan starting on January 1, 1974, as all other plans other than those established and maintained by churches for their own employees and those established by churches and maintained by church pension boards were immediately subject to ERISA in 1974. Also, the IRS position on stand-alone church plans was not formulated until 1982 and the hospital association did not request a church plan letter until 1991.

[13] *See* Jacklyn Wille, *Feds Break Silence, Back Hospitals in Church Pension Battle*, Bloomberg BNA Pension & Benefits Daily, January 30, 2017, http://www.bna.com/feds-break-silence-n5798208023. "Between 1991 and 2013, the PBGC refunded nearly $50 million in premium payments to employers that claimed church plan status for their pension plans according to documents obtained by Bloomberg BNA under the Freedom of Information Act."

exemption letters from the IRS notify their employees and explain to them the consequences of the exemption.[14] The Dignity and Advocate participants had no realistic way of knowing that they had lost pension insurance and other ERISA protections. That is because generally the only people who knew that church plan rulings had been requested and issued before the issuance of the 2011 Revenue Procedure were the requesting employers, IRS officials, and the consulting firms that had persuaded the employers that applying for church plan rulings was a too good to be true opportunity for saving money for their institutions.[15]

Unless the decisions below are upheld, not only will the pensions of Saint Peter's participants and those of current and future retirees in hundreds of other plans sponsored by church-related hospitals, nursing homes, schools, and community centers that have received church plan rulings be at risk, but countless others also will be in danger of losing their hard-earned and long-promised benefits.

It is no exaggeration that legitimizing the IRS rulings would result in a flood of new ruling requests.

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[14] In Rev. Proc. 2011-44, 26 C.F.R. 601.201, the IRS lifted a five-year moratorium on church plan rulings and required that applicants for future rulings notify participants that the issuance of a church plan ruling would result in the loss of all ERISA protections.

[15] Although the rulings are published by the IRS and reported in a trade press publication, they are so heavily redacted that even if the Dignity and Advocate participants had known that rulings existed there would have been no way of knowing the identity of plans that had received rulings or that the rulings meant that they would lose pension insurance and that their plans would no longer be subject to minimum funding standards or other ERISA protections.

In many cases, the PBGC premium refunds alone would exceed the costs of obtaining the rulings, and the rulings would allow the agencies to avoid paying future PBGC premiums, and all of the costs associated with reporting and disclosure.

Most important, the rulings would free the plans from ERISA's minimum funding standards. Although Saint Peter's has increased the funding of its plan since the *Wall Street Journal* reported in 2010 that its funding level was only 64 percent, *see* Schultz, *supra* note 3, it has already frozen the plan, and there would be nothing to prevent it from lowering its annual contributions significantly in favor of other agency priorities, turning it into a wasting trust that could quickly run out of money. Since the Diocese has disclaimed financial responsibility for the Saint Peter's pension plan, the retirees' fears of facing poverty in retirement could all too-quickly become a reality.

II. The History of the Church Plan Exemption

The Welfare and Pension Disclosure Act of 1958, amended in 1962, was the first major Federal legislation attempting to safeguard the rights of participants in employee benefit plans. Welfare Pension and Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 998 (1958) (amended 1962). Relying primarily on disclosure and reporting, the Act included an exemption for the plans of all tax-exempt entities, whether a secular organization, a church, or a church-affiliated organization. *Id.* § 4(b)(4).

In ERISA, which provided more substantive protections for participants, including minimum funding standards and mandatory insurance for defined benefit pension plans, Congress decided a blanket exemption

for non-profit charitable organizations was inappropriate. Instead, it included a broad exemption for plans sponsored by governmental entities, ERISA § 3(32), 29 U.S.C. § 1002(32)(1974) and a narrow exemption for plans sponsored by churches, *id.* at § 3(33).

The statute defined a church plan as a "plan established and maintained for its employees by a church or a convention of association of churches." *Id.* Such plans could only cover employees of the church itself; they were not permitted to cover employees of church-affiliated agencies. There was, however, a grandfather provision that permitted church plans in which affiliated agencies were already participating in 1974 to continue to do so until 1982. *Id.* Thus, after 1982, non-church employees could not participate in a church plan. The statute was unambiguous in treating stand-alone non-profit plans, whether affiliated with a church or not, as plans subject to ERISA.

The legislative history of ERISA includes a single explanation for the exemption for churches. A 1973 report on an early pension reform bill explained that "[t]he committee is concerned that the examinations of books and records that may be required in any particular case as part of the careful and responsible administration of the insurance system might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 383, 93d Cong, 1st Sess. 81 (1973). The report immediately clarified that the exemption for plans established by churches would not apply to a plan "if the plan is a multiemployer plan and one of the employers in the plan is not a church." *Id.* Thus, a church plan could not be an amalgam of a church plan and an agency plan.

Congress thus did not believe that the stated rationale for the church exemption—exempting the government from reviewing church records—applied to programs that covered church-affiliated agencies, such as Petitioners' hospitals.

The exemption discussed in the 1973 Senate committee report was substantially identical to the one that ultimately was included in ERISA, except that ERISA included the temporary grandfather provision that permitted a pre-ERISA multiemployer plan established and maintained by a church to qualify for the church-plan exemption even though it covered both employees of a church and employees of one or more affiliated agencies. I.R.C. § 414(e)(3)(1974). This special temporary provision was to expire on December 31, 1982. *Id.*

Congress's decision not to exempt non-profits, whether secular or religious in purpose, from ERISA represented the view that employees—such as nurses, teachers, custodians, secretaries—were as entitled to pensions that were funded, fair, and insured, as employees who worked in the for-profit sector of the economy. Moreover, a church's plan would lose its ERISA exemption if it included an agency plan or included agency employees after 1982. In other words, Congress decided not to indirectly subsidize charitable organizations (as it had in the Pension and Welfare Disclosure Act) by exempting them from the new ERISA minimum standards that other private-sector employers had to satisfy. The only exemption was a limited one, for plans that covered employees of churches but not employees of religious agencies.

When ERISA was enacted, then, there was no question—as the Solicitor General's brief acknowledges, SG Br 3-4—that stand-alone agency plans were

not covered by the church plan exemption. The plans of Petitioners, and their predecessor plans, were subject to ERISA in 1974 and there is no reason to think, and certainly nothing in the record to suggest, that they did not fully comply until the IRS began issuing ex parte rulings.

Churches were unhappy that the rule allowing a church plan to cover agency employees would expire after 1982 and began lobbying to make that rule permanent. This lobbying group, which is currently known as the Church Alliance and which has filed an *amicus curiae* brief in this case, also lobbied for a provision to make clear that plans maintained by church pension boards—organizations such as corporations, trusts, or non-profit associations to administer and/or fund the pension plan—were treated as church plans even though not directly maintained by the church itself (or by a convention or association of churches). In 1980, the Church Alliance persuaded Congress to amend ERISA to make the grandfather rule permanent and to ensure that the IRS would not challenge the bona fides of a church plan maintained by a church pension board.

As noted, at the time of this lobbying, the stand-alone plans of petitioners and every other church agency were subject to ERISA. Yet no one—not the Church Alliance, the Catholic Health Association or their members, not a single church, pension board, or church agency, asked for, argued for, or even mentioned the need for the exemption to be extended to stand-alone plans. *See generally* Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, ABA Section of Labor and Employment Law, Employee Benefits Newsletter (Summer 2014). At the time, there were thousands

of such plans that had already brought themselves into compliance with ERISA. If this were an issue, someone surely would have said something explicit about the need for agencies to sponsor their own church plans free of actual church participation. And presumably if this had been an issue, Congress would have addressed it directly and not obliquely, by providing that a church plan is a "plan established or maintained by a church, a convention or association of churches, or a church agency."

The lobbying was focused primarily on one issue: expanding the grandfather rule. The lobbying was based on a simple point: it made no sense for a church plan that covered agency employees to have to separate them out into a new plan after 1982. This would create costs in the transition, would impose new and high costs on the church agencies who could no longer rely on church support (and presumably economies of scale) for their plan, and would create obstacles to ministers who moved from pulpit to agency and would no longer have the seamlessness of benefits under a single plan. These were the arguments. No one mentioned stand-alone plans sponsored by agencies without church involvement. The only problem raised was that existing plans covering both church and agency employees would have to be fragmented after 1982.

Petitioners, however, now claim that they were in fact asking for something different: approval for religiously-affiliated agencies to sponsor their own plans, not an extension of the status quo but a new status quo, one in which any charitable organization could sponsor its own unregulated employee benefit

plan if it had some affiliation with a church or convention of churches.[16] To make this claim, Petitioners argue (i) that this was what Congress did when it added to the statute a provision that was justified as clarifying that a church plan did not lose its exemption because it was maintained by a pension board; and (ii) that the legislative history clearly demonstrates that Congress intended to widen the exemption to include agency stand-alone pension plans.

The legislative history constructed by Petitioners and their *amici* is a phantasmagoria, constructed of a few stray sentences removed from context and assertions without record support. Petitioners' alternative legislative history makes three primary points:

a. Petitioners say that the Church Alliance and its members, and the sponsors of the amendment, argued that the IRS should not be defining what activities are essential to the activities of the church. This is true, but the argument was that the IRS should not tell a church who may participate in a plan that the church itself established and maintained. No one argued that agencies should be able to establish their own exempt plans.

b. Petitioners also cite claims by the legislation's sponsors indicating that agency plans would have to bear additional costs if church plans were not able to continue to include affiliated agencies and that it was doubtful that some of these agency plans could financially bear the additional costs of complying with ERISA. But the legislative sponsors were

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[16] This, of course, would create First Amendment establishment issues since a church hospital could sponsor an unregulated pension plan but a secular charity with an identical charitable mission could not.

referring to agencies that were currently participating in multiemployer church plans covered by the temporary grandfather provision and they were arguing that such agencies should continue to be able to participate in such church plans beyond 1982. They were not arguing that agency stand-alone plans, which were already subject to ERISA (and had been for more than half a decade at the time of the amendments), should now be exempted.

c. Petitioners also argue that two statements, one by Daniel Halperin, then Assistant Secretary of the Treasury for Tax Policy, and one by Senator Jacob Javits, indicate that the legislation was intended to exempt stand-alone agency plans from ERISA. But neither statement supports Petitioners' position.

Assistant Secretary Halperin stated in oral testimony before the Senate Finance Committee that "we see no justification for expansion of the complete exemption from ERISA from churches to church-related agencies. Therefore we have opposed S. 1090 as it stands. Our position on this bill and on S. 1091 will be set forth in detail in the written statement for the record." *Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Sen. Comm. on Finance,* 96th Cong., 1st Sess. 190 (1979) (Statement of Daniel Halperin, Assistant Secretary, Department of Treasury). That written statement makes clear that Mr. Halperin was referring to the permanent extension of the grandfather rule permitting church plans to cover agency employees. In that statement, he notes that S. 1091 would make three changes in the definition of church plans, the second of which is pertinent here:

> "Second, the bill would define the term 'employee,' for purposes of determining who

> may participate in a church plan to . . . include any employee of an organization which is controlled by or associated with the church or a convention or association of churches so long as such organization is exempt from tax. These provisions would substantially expand the concept of church plan and by allowing church agencies to be included in church plans would effectively make the temporary rule contained in current law permanent.
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> "The effect of the current [temporary grandfather] rule is that employees of church agencies will, after 1982, be entitled to the full protections provided by ERISA. We believe this is beneficial. . . . Therefore we oppose the provision of S. 1091 which would extend the temporary rule relating to church agencies . . ."

Id. at 223.

This makes clear that the Department of the Treasury was objecting to the extension of the temporary grandfather rule, which permitted plans sponsored by churches to also include church agencies. The Treasury was not commenting on a non-existent proposal to exempt stand-alone agency plans that were already subject to ERISA.

Similarly, Senator Javits made a statement on the Senate floor indicating concern with S. 1091 because "it exempts those who work for schools and similar institutions that are church-related." 126 Cong. Rec. 20,180 (1980). But there is no reason to believe that Senator Javits was doing more than expressing his displeasure with S. 1091 making the temporary grandfather rule allowing a plan established and maintained by a church to continue to include agencies

and their employees. Yes, the Javits statement could have described legislation not under consideration, but it is far more likely that Javits was, like Assistant Secretary Halperin, responding to the legislation that was before the Senate, which purported only to extend the grandfather provision and clarify that a church plan did not lose its exemption because it was maintained by a church pension board.

d. Petitioners argue that nothing in the legislative history "suggests . . . any reason for" a requirement that a church must establish a pension plan maintained by a church pension board or similar organization. Pet. Br. at 40. This assertion is incorrect.

The original church-plan amendment language proposed in S. 1091 provided that a "plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan *established* and maintained by an organization, whether a civil law corporation or otherwise, whose principal purpose is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches." *Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Sen. Comm. on Finance, 96th Cong., 1st Sess. 101, 102-103 (1979)*; *see also* 124 Cong. Rec. 16,523 (1978)(language in 1978 bill introduced by Senator Talmadge)(emphasis supplied).

The Department of the Treasury objected to this language because it gave church pension boards the power to establish church plans. Representing the

Department, Daniel Halperin submitted a written statement that said the following:

> In proposed Treasury regulations issued on April 9, 1977, no provision was made to allow a program maintained by a pension board or other separately incorporated organization to maintain a church plan. Through written comments and at a public hearing . . . with respect to the proposed regulations, commentators suggested that the term church plan should include a plan which is administered by a separately incorporated organization such as a pension board or a bank. We agree that such a provision is appropriate.
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> However, S. 1091 would go substantially further by permitting a plan which is established and maintained by the administering organization to be considered a church plan. . . . we do not feel it is appropriate to expand the definition of church plan this far.

Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Sen. Comm. on Finance, 96th Cong., 1st Sess. 222 (1979).

At some point after the hearings, the language on plans administered by church boards was changed. Under the revised language, which is now embodied in ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), a plan "established and maintained" by a church for its employees includes a plan "maintained" by a (C)(i) organization. The power to "establish" a church plan under (C)(i) is thus lodged exclusively with churches and conventions or associations of churches, not (C)(i)

organizations. If a church or a convention or association of churches is unwilling to establish a benefit plan, it is not a "church" plan under the statute.

III. Statutory language and legislative history show that Congress intended that (C)(i) only exempt church-established plans that are maintained by church pension boards.

A 1982 General Counsel Memorandum, IRS GCM 39,007, 1983 WL 197946 (Nov. 2, 1982), and a series of private letter rulings that followed, stated that a plan that was not established by a church could nonetheless be exempt from ERISA if the plan were maintained by an administrative committee of the plan sponsor. In the 1982 GCM and each of the successive rulings, the rationale supporting this conclusion was the text of (C)(i) stating that a plan of a church-related agency could be treated as a church plan if it was "maintained by an organization, whether a civil law corporation or otherwise" that had as its principal purpose the administration or funding of the plan.

The legislative history makes plain that this provision was intended to apply to church pension boards, not a committee of one or more agency employees that administer the pension plan. (Virtually every pension plan is administered by such a committee.) The IRS position is that such an administrative committee is "an organization" and that the committee "maintains" the pension plan.[17]

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[17] The Saint Peter's ruling, which is virtually identical to almost all of the rulings issued to pension plans, is illustrative. The ruling notes that the plan was established in 1964 and is administered by a Retirement Plan Committee. It then quotes the language of Section 414(e)(3)(A) which states that a church plan

As Petitioners correctly point out, the issue of whether this language supports the IRS position is not within the scope of the question presented to this Court. (Pet. Br. 22, fn.4) However, examination of this language can illuminate the question that is before the Court, namely whether Congress intended for plans that were neither established and maintained by a church nor established by a church and maintained by a church pension board to be denied the protections of ERISA.

The only way to bring a plan's internal administrative committee within the statutory language would be to find that it not only has as its principal purpose the administration of a plan (which all administrative committees do) but also that it is "an organization, whether a civil law corporation or otherwise," that maintains the plan.

Plainly, a pension plan's administrative committee is not a civil law corporation. It only fits within the (C)(i) framework if it can come within the statutory phrase "or otherwise." This is how the IRS appears to have construed the language. In other words it is

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"includes a plan maintained by an organization, whether a civil law corporation or otherwise,..." Next it states that for an organization that is not itself a church, the plan must be administered or funded (or both) by an organization described in section 414(e)(3)(A) of the Code. It then finds that the sole purpose of the Saint Peter's Retirement Plan Committee is the administration of the plan. Finally, the ruling concludes that "the Committee constitutes an organization described in 414(e)(3)(A) of the Code. (J.A. 379 - 392)

The Saint Peter's ruling is also similar to many others in finding that ties between the Retirement Plan Committee and the church had been established only after the initial request for a ruling had been filed. This "control" is then found sufficient to be applied retroactively to January 1, 1974.

simply a contentless label that can be affixed to any group or committee of people, indeed even a committee of one person. *See* I.R.S. P.L.R. 8851074, 1988 PLR LEXIS 2970 (Sept. 28, 1988)(single plan administrator can qualify as an organization).

However, the legislative history of the phrase, shows that the language was designed to apply to church pension boards. The words "or otherwise" were not meant to sap the word "organization" of content, but to clarify that an actual organization—a church pension board—did not have to be incorporated, but could also have a different organizational structure.

As Representative Barber Conable explained in 1978, when introducing the first version of the church plan amendments, "[a] pension board is usually incorporated because the church does not want the funds set aside for retirement purposes to be subject to the general creditors of the church." 124 Cong. Rec. 12108 (1978).

However, Representative Conable and other members of Congress recognized that church pension boards could also have non-corporate structures. When, in a colloquy on July 29, 1980, Senator Talmadge referred to church pension boards as "separate incorporated organizations," Senator Long quickly corrected him, saying that "the bill recognizes the status of a church plan maintained by a pension board by providing that a plan maintained by **an organization, *whether separately incorporated or not***....is a church plan..."126 CONG. REC 20245 (1980)(statements of Sen. Herman Talmadge and Sen. Russell Long)

This correction was necessary because some of the churches and church pension boards seeking the

amendments were not incorporated. They were structured either as trusts (for example, the Rabbinical Pension Board now the Pension Reform Board) or unincorporated associations. These are alternative arrangements for tax exempt nonprofit organizations that are authorized by Section 501(c)(3) of the Internal Revenue Code.

In other words, there is nothing anywhere to suggest that the "or otherwise" language was meant to demote "organizations" to the level of an employer-created internal pension plan committee, which is part of the employer and is not a separate organization apart from the employer. The "or otherwise" language was simply to clarify that a church pension board did not have to be incorporated. The conclusion is inescapable that Congress only intended for (C)(i) to exempt plans established by churches that were maintained by church pension boards.

IV. ERISA Does Not Permit Voluntary, Revocable ERISA Plans

Petitioner Saint Peter's Healthcare System contends that it "for many years voluntarily complied with ERISA standards." Pet. Br. 13. Voluntary compliance apparently included paying PBGC insurance premiums for insurance that is not available to non-ERISA plans and representing to its employees that their plan was an ERISA plan, subject to all ERISA protections and covered by PBGC insurance. (J.A. 399-403).[18]

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[18] These statements are from the plan's summary plan description. That description concludes by informing plan participants to "contact the nearest office of the U.S. Labor-Management Services Administration, Department of Labor" if they have questions about their "rights under ERISA."

Saint Peter's statement is almost certainly disingenuous: it either believed that it was sponsoring an actual ERISA plan, which is not what it now claims, or it deliberately deceived its employees into believing that their plan was protected by ERISA.

Petitioners note in their brief, Pet. Br. 13, that ERISA does include a provision that allows church plans to forego church plan status, but the election is irrevocable once made. IRC § 410(d)(2)(1974). In other words, once a church plan tells employees that their benefits are protected by federal law and federal pension insurance, the church must thereafter conform the plan to ERISA's minimum standards. Yet Saint Peter's claims that it can avoid the irrevocability requirement by misleading—either intentionally or negligently—its employees into believing that their benefits are protected by ERISA. The agencies enforcing ERISA should be reluctant to tolerate this type of deception, especially when it runs for more than three decades.

V. Petitioners Exaggerate the Consequences to Plan Sponsors of Affirmance of the Decisions Below and Ignore the Threat to Retirement Security that these "Church Plans" Pose to Agency Employees and Their Families.

Petitioners predict that affirmance of the three circuit decisions below will "sow utter chaos" for everyone. They assert that plans will have to adhere to ERISA's funding rules, although the IRS would be barred by the private letter rulings from collecting penalties for past funding violations and has broad power to issue funding waivers to ameliorate future funding requirements to prevent hardship. IRC § 412(c)(1). (And if Petitioners' brief is credited, their

plans already are in or near compliance with ERISA funding standards. Pet. Br. 10.) They also claim that the plans will have to conform to ERISA's vesting rules, although Petitioners' plans, like most other stand-alone agency plans, were written to conform to the vesting rules during the period they operated as ERISA plans and there is no record support that conforming will be problematic or expensive. Moreover, the IRS can by regulatory guidance limit the application of ERISA rules that bar amendments reducing certain types of benefits. I.R.C. § 411(d)(6). As for ERISA fines for non-disclosure, they are awarded in the discretion of courts, ERISA § 502(c)(1),(3), 29 USC § 1032(c)(1),(3), and it is improbable that courts will levy penalties on plans that failed to make disclosures because of their good faith belief that they were exempt. The PBGC is unlikely to seek penalties for the premiums. *See* ERISA § 4007(b), 29 U.S.C. § 1307(b). In addition, the IRS and PBGC can waive all tax penalties for non-compliance and can provide various forms of relief allowing plans to ease into full tax and ERISA compliance.

Most important, ERISA is an equitable statute and the courts themselves may issue remedies in these cases that would limit the effects on Petitioners and similarly situated religiously-affiliated nonprofit organizations. The Pension Rights Center would strongly support and advocate for appropriate efforts to ameliorate hardship. And of course Congress can also fashion relief if such relief were needed.

The hospitals also raise the specter of terminated agency defined-benefit plans. In fact, as noted above, Saint Peter's has already frozen its pension plan for new entries, and many religiously-affiliated nonprofits now only offer 403(b) or other defined contribution

plans to current workers. The principal concern of Saint Peter's longer-service employees and retirees, and those at other hospitals, schools, and social services agencies, is to preserve the pensions they were assured they would receive. If asked, younger workers, might well prefer another type of plan on which they can depend instead of a poorly funded, uninsured defined benefit plans that their employers can amend to reduce already earned benefits.

Significantly, nowhere do Petitioners even acknowledge that these unfunded agency plans—plans that the churches to whom the agencies are affiliated disclaim any responsibility—pose a genuine threat to the financial security of hundreds of thousands of men and woman who did nothing wrong other than give up current wages for deferred compensation, in the belief that their plans, sponsored by faith-based entities, would live up to their promises.

CONCLUSION

The judgments of the courts below should be affirmed.

Respectfully submitted,

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February 23, 2017